Supreme Court, U.S.
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No. 00-238

In The

Supreme Court of the United States

NAOMI TREECE,

Petitioner,

v.

STEVEN HOCHSTETLER and
CITY OF NAPERVILLE, ILLINOIS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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ARGUMENT

I. REASONS FOR DENYING THE WRIT

In late 1991, Naomi Treece's ("Petitioner") husband, Otis Treece, was arrested for theft from his employer, Respondent City of Naperville ("City"). Prior to the arrest of Petitioner's husband, Petitioner sought out Respondent Officer Steven Hochstetler ("Hochstetler"), the City of Naperville police officer investigating Otis Treece, and repeatedly threatened him and his family with death in an effort to drop the investigation against Otis Treece. Thereafter, pursuant to a valid overhear order, Hochstetler recorded two conversations with Petitioner, capturing threatening statements made by Petitioner against him and his family.

Thereafter, Petitioner was charged with three counts of intimidation, charges that were later dismissed by the DuPage County State's Attorney. Petitioner then sued the City and Hochstetler on state and federal claims of malicious prosecution along with a state claim of intentional infliction of emotional distress. The claims against Hochstetler were later submitted to a jury. The claims against the City were bifurcated, with the City agreeing to an entry of judgment in the event of a jury verdict against Hochstetler.

The jury rejected all of Petitioner's claims following a two-week jury trial. Petitioner's post-trial motion was also denied by the district court. The district court based its denial on Petitioner's complete lack of credibility and cited specific portions of the taped conversations that evidenced Petitioner's threats against Hochstetler and his family.

On appeal, the Seventh Circuit affirmed the rulings of the district court. The Seventh Circuit held that the district court properly excluded prejudicial evidence of Hochstetler's prior acts, based on their complete lack of similarity to Petitioner's claims. The Seventh Circuit then applied the Court's decision in *City of Los Angeles v. Heller*, 475 U.S. 796, 799, 106 S.Ct. 1571, 1572, 89 L.Ed.2d 806 (1986) (per curiam) to affirm judgment for the City, based on the jury's finding that Petitioner suffered no constitutional deprivation. Finally, the Seventh Circuit affirmed the decision of the district court to bifurcate the hearing, finding that the district court did not abuse its discretion.

Petitioner has completely failed to establish her claims against either the City or Hochstetler. Petitioner's failure is due in large measure to the mountain of evidence captured on audio and videotape that established her threats against Hochstetler and his family. Despite her failure to achieve any measure of success in establishing a factual basis for her claims, Petitioner now seeks to overturn the decisions of the jury, the district court and the Seventh Circuit, by asking the Court to find a conflict among the circuits in their application of *Heller* where no such conflict exists. The Petition should be denied.

A. THE DECISION OF THE SEVENTH CIRCUIT IS IN HARMONY WITH PRIOR SUPREME COURT DECISIONS AND OTHER CIRCUITS

In *City of Los Angeles v. Heller*, 475 U.S. 796, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986) (per curiam), the Court held that a jury verdict acquitting a Los Angeles police officer

of a charge of excessive force precluded the imposition of liability on the City of Los Angeles for adopting a policy condoning the use of excessive force.

The Court reasoned that where a municipality is "sued only because [it was] thought legally responsible" for the actions of its officers, it is "inconceivable" to hold the municipality liable if its officers inflict no constitutional harm, regardless of whether the municipality's policies might have "authorized" such harm. *Heller*, 475 U.S. at 799, 106 S.Ct. at 1573. The Court concluded, "If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point." *Heller*, 475 U.S. at 799, 106 S.Ct. at 1573.

1) The Opinion of the Seventh Circuit is Consistent with *Heller*

The Seventh Circuit properly applied the Court's decision in *Heller* to the case at bar. The Seventh Circuit recognized that *Heller* establishes that municipal liability is derivative of its police officer's liability. *Appendix* at 9a. In applying *Heller*, the Seventh Circuit held that as a result of the jury verdict in favor of Hochstetler, "it is impossible under existing case law for the City to be held liable for the knowledge or inaction concerning its officer's activity." *Appendix* at 10a.

Here, as in *Heller*, Petitioner was unable to prove that she suffered any constitutional injury at the hands of Hochstetler. Moreover, Petitioner cited no evidence that offered any basis for municipal liability apart from the

actions of Hochstetler. Despite Petitioner's repeated claims of municipal action that could result in liability, the Petition does not set forth any facts independent of her claims against Hochstetler upon which municipal liability could rest in light of the jury's finding of no liability by Hochstetler. As a result, the Seventh Circuit correctly applied *Heller* in affirming the decision of the district court.

2) The Opinion of the Seventh Circuit is Consistent with Other Supreme Court Decisions

Petitioner argues that the decision by the Court in *Heller* is inconsistent with the Court's decisions in *City of Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989) and *Owen v. Independence*, 445 U.S. 622, 654, 100 S.Ct. 1398, 1417, 63 L.Ed.2d 673 (1980). Neither of these cases, however, addressed the issue of derivative liability before the Court in *Heller*. In fact, *Owen* predates the Court's decision in *Heller*. Therefore, Petitioner's position is without merit.

The Court in *Canton* held that a plaintiff seeking to establish municipal liability on the theory that a facially lawful municipal action – there, an allegedly inadequate training program – has led an employee to violate a plaintiff's rights, must demonstrate that the municipal action was not simply negligent, but was taken with "deliberate indifference" as to its known or obvious consequences. *Id.*, 489 U.S. at 388, 109 S.Ct. at 1204.

The issue in *Owen* was whether a municipality was entitled to the same qualified immunity as an individual defendant. In that case, the city council allegedly censured and discharged an employee without a hearing. While recognizing individual qualified immunity, the Court rejected a claim that municipalities should be afforded qualified immunity based on the good faith of their agents. *Id.*, at 651, 100 S.Ct. at 1416.

Neither *Canton* nor *Owen* conflict with the Court's decision in *Heller*. Moreover, Petitioner never explains how *Canton* and *Owen* conflict with *Heller*. Pet. at 15-18. The basic holding of *Heller* that a determination of no liability against a police officer removes any basis for liability against a municipality, simply does not conflict with *Owen* or *Canton*.

The decision in *Canton*, consistent with *Heller*, held the inadequacy of police training may serve as the basis for § 1983 liability *only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact*. *Id.*, 489 U.S. at 388, 109 S.Ct. at 1204 (emphasis added). Petitioner's well-worn refrain that evidence exists of a City policy of malicious prosecution, fails in light of the jury's determination that Petitioner did not suffer any constitutional deprivation at the hands of Hochstetler. Pet. at 17. Here, the jury determined that Hochstetler did not violate the rights of Petitioner. Therefore, under *Canton* and *Heller*, no liability can rest with the City and the Petition must be denied.

3) The Decision of the Seventh Circuit is Consistent with the Application of *Heller* by the Other Circuits

The decision of the Seventh Circuit in this case is consistent with decisions of other circuits applying *Heller*. The federal circuits have consistently applied *Heller* in the same manner as the Seventh Circuit in this case. *See Evans v. Avery*, 100 F.3d 1033, 1039-1040 (1st Cir. 1996); *Smith v. Edwards*, 175 F.3d 99, 107 (2nd Cir. 1999); *Grayson v. Peed*, 195 F.3d 692, 696 (4th Cir. 1999); *Saenz v. Heldenfels Bros., Inc.*, 183 F.3d 389, 392 (5th Cir. 1999); *Scott v. Clay County, Tenn.*, 205 F.3d 867 (6th Cir. 2000); *Tesch v. County of GreenLake*, 157 F.3d 465, 477 (7th Cir. 1998); *Wilson v. Spain*, 209 F.3d 713, 717 (8th Cir. 2000); *Ruvalcaba v. City of Los Angeles*, 167 F.3d 514, 518 (9th Cir. 1999); *Myers v. Oklahoma County Bd. Of County Com'rs*, 151 F.3d 1313, 1316 (10th Cir. 1998); *Rooney v. Watson*, 101 F.3d 1378, 1381 (11th Cir. 1996).

Against this backdrop of overwhelming authority against her position, however, Petitioner directs the Court to several cases to support her claim that the decision of the Seventh Circuit in this case conflicts with other circuits in its application of *Heller*. A cursory examination of these cases undermines this contention.

Initially, it is important to note that most of the cases cited by Petitioner were decided prior to *Heller*. *See Smith v. City of Oklahoma City*, 696 F.2d 784 (10th Cir. 1983); *Garcia v. Salt Lake County*, 768 F.2d 303 (10th Cir. 1985); *Anderson v. City of Atlanta*, 778 F.2d 678 (11th Cir. 1985). Lacking the guidance of *Heller*, these decisions do not provide support to Petitioner's position.

One of the cases cited by Petitioner decided after *Heller* is *Fagan v. City of Vineland*, 22 F.3d 1283 (3rd Cir. 1994). The court in *Fagan* ruled that when plaintiffs bring separate, independent constitutional claims against officers and their employers, employers will not automatically receive judgment in their favor following judgment for their officers. *Fagan*, 22 F.3d at 1291. Importantly, the *Fagan* court distinguished *Heller* based on the due process claims made in *Fagan* versus the Fourth Amendment claims made in *Heller*. *Fagan*, 22 F.3d at 1291-1292.

Unlike *Fagan*, Petitioner's claims against the City and Hochstetler were based on the same theories and the same set of facts. Moreover, Petitioner's claims were brought under the Fourth Amendment, like *Heller*, rather than the Fourteenth Amendment claims at issue in *Fagan*. Consequently, *Fagan* is distinguishable from the case at bar and does not support Petitioner's position.

Petitioner's reading of *Parrish v. Luckie*, 963 F.2d 201 (8th Cir. 1992) is also wrong. This case stands for the proposition that personal liability is not necessary for municipal liability, not that municipal liability is possible where an officer is exonerated. Consistent with *Heller* and the Seventh Circuit, the *Parrish* court concluded that a claim against an actor in his official capacity fails when the jury determines that the plaintiff's constitutional rights were not violated. *Id.*, 963 F.2d at 206. Therefore, this case does not support Petitioner's position.

4) Petitioner's Institutional Analysis Argument is Without Merit

For the first time, Petitioner advances the doctrine of "institutional analysis" in support of her argument. Pet. at 10. Petitioner failed to raise this theory of liability at any point before either the district court or the Seventh Circuit. Petitioner's failure to raise this argument constitutes a waiver. *See California v. Taylor*, 353 U.S. 553, 556, n. 2, 77 S.Ct. 1037, 1039, n. 2, 1 L.Ed.2d 1034 (1957). Even if properly raised, it is an understatement to say that Petitioner's theory of "institutional analysis" is without foundation. Petitioner fails to cite to any case that has ever entertained this theory, consistent or inconsistent with Petitioner's position.

Petitioner's primary support for this theory of liability is law review articles. Pet. at 10-11. The sole case cited in support of this theory, *Barrett v. Orange County Human Rights Com'n*, 194 F.3d 341 (2nd Cir. 1999), not only fails to mention this theory, but relies on two circuit court cases that predate *Heller* in reaching the portion of its decision relied upon by Petitioner. *Barrett*, 194 F.3d at 350; Pet. at 11. In *Barrett*, a wrongful discharge case, the court reasoned that since actions taken by the commission were decided as a body, judgment in favor of only two members of the commission did not automatically result in judgment for the entire commission. *Barrett*, 194 F.3d at 350.

In sharp contrast to the claims in *Barrett*, Petitioner alleged that her injuries were solely caused by the actions of Hochstetler, in that her arrest constituted a malicious prosecution by Hochstetler as a result of her failure to

pay him a bribe. Petitioner has consistently failed to cite to any facts not involving Hochstetler that caused any constitutional injury to her. Petitioner maintains this consistency by failing to cite any facts in her Petition that establish municipal liability apart from the factual allegations against Hochstetler. The jury, district court and Seventh Circuit unanimously rejected liability against Hochstetler based on these facts. Therefore, the Petition should be denied.

B. THE APPLICATION OF THE STATE LAW REQUIREMENTS FOR MALICIOUS PROSECUTION IS PROPER

Petitioner also challenges the Seventh Circuit's requirements for maintaining a malicious prosecution claim. Pet. at 10. Petitioner argues that she suffered a seizure under the Fourth Amendment and that the Seventh Circuit improperly applied a subjective instead of an objective malice test under *Reed v. City of Chicago*, 77 F.3d 1049 (7th Cir. 1996). Pet. at 18-22.

The opinion of the Seventh Circuit, however, did not address these issues, and for good reason. Petitioner did not raise the seizure issue or malice requirement under *Reed* in her appeal to the Seventh Circuit. These issues, as with Petitioner's "institutional analysis" theory, are waived because Petitioner failed to raise these issues at any point before either the district court or the Seventh Circuit. *See California v. Taylor*, 353 U.S. 553, 556, n. 2, 77 S.Ct. 1037, 1039, n. 2, 1 L.Ed.2d 1034 (1957).

Petitioner appears to challenge the jury instruction that set forth the elements of a malicious prosecution

claim under *Reed*. At no time, however, at the pre-trial conference, post-trial motion, or in the Seventh Circuit, did Petitioner raise an objection to the malicious prosecution instruction given to the jury. Jury instructions simply cannot be challenged for the first time in a Petition to the Court. *See Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982), at 125-126, n. 28, 102 S.Ct. 1558.

The question introduced here by Petitioner concerning the appropriate malice context begs the question of whether there was sufficient evidence put forth by Petitioner to meet any of the elements of her claims, not simply the malice issue now raised for the first time.

The fact is that Petitioner does not question the jury's rejection of her incredible claims in the Seventh Circuit. Petitioner does not and cannot suggest that even if an objective malice instruction was tendered to the jury, the result would have changed to a judgment in her favor. Instead, Petitioner incorrectly asserts that the application of an objective malice test could result in municipal liability where Hochstetler was not liable based on the same facts. Pet. at 21. Simply put, Petitioner's claims were wholly unbelievable and did not meet any of the requirements of a malicious prosecution cause of action. Therefore, the Petition should be denied.

C. THE BIFURCATION OF THE TRIAL DID NOT CONSTITUTE AN ABUSE OF DISCRETION

Federal Rule of Civil Procedure 42(b) permits the separate trial of any issue when separation would be "in furtherance of convenience or to avoid prejudice, or when

separate trials will be conducive to expedition and economy. . . . " *DeWitt, Porter, Huggett Schumacher & Morgan, S.C. v. Kovalic*, 991 F.2d 1243 (7th Cir. 1993); *MCI Communications v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1166 (7th Cir. 1983). Only one of these criteria need be satisfied for a court to order a separate trial. *Id.* The appellate court will review a district court's bifurcation decisions for an abuse of discretion. *Barr Laboratories, Inc. v. Abbott Laboratories*, 978 F.2d 98, 105 (3d Cir. 1992).

The case at bar presents all of the criteria for bifurcation. Bifurcation furthered convenience by allowing the City to avoid the costs and burdens of trial where the City had no liability unless Hochstetler was found liable. Here, the Seventh Circuit properly affirmed the decision of the district court, as the City did not need to bear the burdens of trial following the decision for Hochstetler on all counts. The ultimate decision to bifurcate under Rule 42(b) rests with the district court's discretion and will be overturned only upon a clear showing of abuse. *Houseman v. U.S. Aviation Underwriters*, 171 F.3d 1117, 1121 (7th Cir. 1999).

Bifurcation also avoided prejudice to Hochstetler by the elimination of facts irrelevant to the interaction between Hochstetler and Petitioner. The other incidents Petitioner sought to admit were ruled admissible only against the City under Petitioner's *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), claims. Bifurcation allowed the jury to focus on the facts surrounding Petitioner and Hochstetler, without the distraction and prejudice of considering other events having absolutely no bearing on Hochstetler's potential liability. Bifurcation allowed the exclusion of the other

events under Federal Rule of Evidence 403 and 404, but retained the ability of Petitioner to put these incidents before the jury if it found in favor of Petitioner, which it did not.

Separate trials against the City and Hochstetler also fostered expedition and economy. The finding by the jury in favor of Hochstetler on all counts vitiated the need for the introduction of any *Monell* evidence. The introduction of the other incidents under Petitioner's *Monell* claim would have involved countless additional witnesses and exhibits. This evidence would have extended an already lengthy two-week trial into a trial lasting a month or more, including trials within a trial. The district court's proper decision to bifurcate the trial saved a substantial amount of judicial time and resources and allowed a decision dispositive to all parties in less than half the time of presenting all the evidence as to Hochstetler and the City in one trial. The jury verdict in favor of Hochstetler on all counts confirmed the district court's decision to bifurcate the trial.

Despite these facts, Petitioner argues that bifurcation resulted in prejudice to her by excluding relevant evidence against the City. Pet. at 22. The evidence reserved for Petitioner's claim against the City had absolutely no relevance in Petitioner's claim against Hochstetler. The jury heard all of the evidence concerning Petitioner's interaction with Hochstetler and found against Petitioner on all counts. There simply were no facts relevant to Petitioner's interaction with Hochstetler that the jury did not hear and consider. Therefore, the decision by the district court to bifurcate the trial was proper and did not constitute an abuse of discretion.

II. MISSTATEMENTS OF FACT

The Petition is replete with misstatements of fact that Respondents set forth below, pursuant to Supreme Court Rule 15.

A. Petitioner Cites "Facts" That Ignore the Jury Verdict

Petitioner's Statement of the Case only provides a resuscitation of her claim that Hochstetler solicited a bribe from her in exchange for dropping charges against her husband, Otis Treece. Petitioner's Statement of the Case ignores the overwhelming evidence of her threats against Hochstetler and his family. This evidence consists of not only Hochstetler's testimony, but Petitioner's own incriminating statements contained on the two audio overhear tapes and Petitioner's own videotape. In addition, Petitioner was repeatedly impeached at trial. The jury plainly accepted this evidence of intimidation against Petitioner while rejecting Petitioner's story in finding for Hochstetler on all counts.

On Page 21, Petitioner asserts that Hochstetler and the City subjected her to a violation of the Fourth Amendment and "resultant deprivations". On Page 11, Petitioner then alleges that the City had an informal or tacit "custom or policy" of allowing constitutional violations. These assertions fly in the face of the jury's verdict finding that Petitioner suffered no constitutional deprivation from the actions of Officer Hochstetler and, therefore, the City. Petitioner's repeated assertions of constitutional violations simply do not make it so.

Petitioner's refusal to acknowledge the finding of the jury undercuts her entire Petition. Simply put, Petitioner's Statement of the Case cannot consist solely of her version of events that the jury considered and rejected. The jury simply could not have believed Petitioner's story and still rendered a verdict against her on all counts. Therefore, factual assertions in the Statement of the Case that are inconsistent with the jury's finding against Petitioner should be stricken.

B. Petitioner Cites "Facts" That the District Court Specifically Excluded as Misleading

On page 5, Petitioner asserts that Hochstetler created a police report alleging intimidation by Petitioner the day before the initial act of intimidation actually occurred. In reality, the date on this report reflected the date on which Hochstetler first encountered Petitioner at her home. The acts of intimidation by Petitioner against Hochstetler began the next day. Hochstetler incorporated the entire interaction with Petitioner into one report, dating the report from the first day he encountered Petitioner.

This specious argument was rejected by the district court and is now resuscitated by Petitioner. The fact is that the district court immediately sustained Respondent's objection to this fallacious argument at trial. The district court then admonished Petitioner's counsel and the jury that the use of this evidence was misleading and that the jury must ignore this line of questioning. The district court further admonished Petitioner not to raise this false issue again. This assertion has no more validity today than when rejected by the district court at trial.

C. Petitioner Inaccurately Recites the "Facts" Concerning the Prior Acts of Hochstetler

On page 5, Petitioner inaccurately recites the "facts" concerning the alleged prior acts of Hochstetler in falsely accusing individuals of crimes. First, the Petitioner fails to state that Zolghadr never filed any complaint asserting that Hochstetler falsely accused him of any crime. Second, no criminal charges were ever lodged against Marjorie Dalton's son.

Finally, in an allegation as misleading as the above-mentioned police report date, Hochstetler never filed a false report concerning Patricia Shetina. As the evidence clearly showed, another officer authored a report indicating he conducted an area canvass regarding a theft from Shetina's store, when he did not. Hochstetler had absolutely no involvement with the canvass.

Petitioner's citation as "facts" events that Petitioner knows to be untrue, and was specifically admonished at trial against their untrue and misleading nature, is outrageous. Moreover, as noted by the district court and the Seventh Circuit, none of these "facts" involved the alleged bribe demand in exchange for dropping criminal charges that is the centerpiece of Petitioner's claim. These "facts" should be stricken.

CONCLUSION

For the reasons set forth above, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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